



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS FOR LACK OF SUBJECT MATTER
JURISDICTION GRANTED IN PART, DENIED IN PART: October 27, 2011

CBCA 2361

ABSOLUTE SOFTWARE, INC.,

Appellant,

v.

DEPARTMENT OF COMMERCE,

Respondent.

Mark R. Vernazza of Edwards Angell Palmer & Dodge, LLP, Boston, MA, counsel for Appellant.

Mark Langstein, Richard Brown, Michael Bogomolny, Shraddha Upadhyaya, and Erin N. Frazee, Office of General Counsel, Department of Commerce, Washington, DC, counsel for Respondent.

Before Board Judges **POLLACK**, **McCANN**, and **KULLBERG**.

McCANN, Board Judge.

Respondent has moved to dismiss all counts of appellant's complaint for lack of subject matter jurisdiction. For the following reasons we grant the motion in part and deny the motion in part.

Background

On or about August 9, 2007, Absolute Software, Inc. (appellant or Absolute) and the Department of Commerce (respondent or DOC) entered into contract number

DG133R07SE3872. Under this contract Absolute was to provide, among other things, licensing, software assurance, technical support, and consultative services for the SmartTRAC Surveillance System and the United States Vessel Monitoring System. Absolute proceeded with performance, and on April 10, 2010, submitted a claim to the contracting officer. That claim was denied on February 14, 2011. Absolute timely appealed that decision to the Civilian Board of Contract Appeals on March 25, 2011.

On April 29, 2011, Absolute filed its complaint. In its complaint Absolute alleges that DOC breached the contract, breached the end user licenses, infringed Absolute's copyright, and misappropriated Absolute's trade secrets.

Discussion

DOC has moved to dismiss Absolute's complaint on the grounds that this Board lacks jurisdiction over copyright infringement claims. It contends that all counts in the complaint are really nothing more than claims for copyright infringement and are, accordingly, beyond the jurisdiction of this Board. In determining jurisdiction, the Board must accept as true all undisputed facts asserted in the complaint and draw all reasonable inferences in favor of the appellant. *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995).

In count I, Absolute alleges that one of DOC's bureaus, the National Oceanic and Atmospheric Administration (NOAA), which operates the National Marine Fisheries Office of Law Enforcement (OLE) (collectively NOAA/OLE), provided Absolute's intellectual property, trade secrets, and/or other confidential information to third parties in violation of Federal Acquisition Regulation clause 52.227-19, *Commercial Computer Software – Restricted Rights* (Jun 1987), 48 CFR 52.227-19 (2006). Absolute also alleges in count I that NOAA/OLE provided Absolute's intellectual property, trade secrets, and/or other confidential information to third parties in violation of the SmartTRAC end user licenses.¹

In its motion to dismiss for lack of subject matter jurisdiction, DOC contends that count I is not a contract claim, but rather is nothing more than a copyright infringement claim, over which the Board lacks jurisdiction.

Under the Contract Disputes Act, 41 U.S.C.A. §§ 7101-7109 (West 2011) (CDA), this Board has jurisdiction to decide contract claims. The jurisdiction of the Board arises from

¹ It is unclear whether Absolute is alleging that additional unspecified parts of the contract were violated.

the CDA. The Board has the jurisdiction to “decide any appeal from a decision of a contracting officer of any executive agency . . . relative to a contract made by that agency.” *Id.* § 7105(e)(1)(B). The CDA applies to all express or implied contracts entered into by an executive agency for the procurement of property other than real property; the procurement of services; the procurement of construction, alteration, repair, or maintenance of real property; or the disposal of personal property. *Id.* § 7102(a). The existence of a contract to which the Government and the contractor are parties is an essential prerequisite to Board jurisdiction. *Presidio County, Texas v. General Services Administration*, CBCA 1209, 08-2 BCA ¶ 33,976; *Inversa, S.A. v. Department of State*, CBCA 440, 07-2 BCA ¶ 33,690.

In count I, Absolute has alleged contract violations, over which this Board has jurisdiction. DOC’s contention that count I is nothing more than a copyright infringement claim lacks merit. DOC’s arguments regarding perceived similarities between Absolute’s copyright infringement claims set forth in count III, and its allegations of contractual violations in count I, are misplaced. An alleged violation of a contract or contract clause is simply not the same as an alleged infringement of a copyright under the copyright laws. In addition, little or no evidence has been presented by Absolute regarding count I. Accordingly, it is not possible for this Board to conclude at this point that the contract claims in count I are a simple repeat of Absolute’s copyright infringement claims set forth in count III.

With regard to count II of the complaint, Absolute alleges NOAA/OLE permitted 617 users to access the SmartTRAC software system over a period of two years in violation of the 2007 contract and the SmartTRAC end user licenses, which allowed for only fifty active users. Again, DOC’s contention that count II is nothing more than a copyright infringement claim lacks merit. Absolute has alleged a violation of the contract, and this Board has jurisdiction to decide whether such a violation took place. Further, at this point, it is unclear what the end user licenses say, how they fit in with the contract, and what effect they have on the contract. Until such is made clear, it would be premature for this Board to dismiss the claim for violation of end user licenses for lack of subject matter jurisdiction.

In count III of the complaint, Absolute alleges that DOC infringed its copyright. It alleges that it has a valid copyright in the SmartTRAC software and that NOAA/OLE infringed Absolute’s copyright when it provided Absolute’s copyrighted materials to third parties. DOC alleges that this Board lacks jurisdiction to hear cases alleging copyright infringement. DOC is correct. “Boards of contract appeals do not have jurisdiction over claims that a contractor’s rights were violated under the Copyright Act” *Data Enterprises of the Northwest v. General Services Administration*, GSBCA 15607, 04-1 BCA ¶ 32,539, at 160,949; *see McKirchy & Co.*, ASBCA 51824, 99-2 BCA ¶ 30,468, at 150,516.

In count IV of its complaint, Absolute contends that the SmartTRAC software, including without limitation its source code, algorithms, and other related information, constitute its trade secrets. It alleges that DOC misappropriated its trade secrets by disclosing them without authorization to third parties. Absolute has not identified the law, rule, regulation, or contract provision upon which it relies to support this allegation. Accordingly, at this point, the Board is unable to decide whether it has jurisdiction over this count.

Decision

The motion is **GRANTED** with respect to count III; otherwise, it is **DENIED**.

R. ANTHONY MCCANN
Board Judge

We concur:

HOWARD A. POLLACK
Board Judge

H. CHUCK KULLBERG
Board Judge